No. 593

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IN THE

Supreme Court of the United States

EDWARD C. ST. CLAIR, Individually and in his own right as a person directly aggrieved and on behalf of all others similarly situated and on behalf of the PEOPLE OF THE STATE OF NEW YORK as a citizen and taxpayer thereof,

Appellant,

against

YONKERS RACEWAY, INC., ROOSEVELT RACEWAY INC., MID-STATE RACEWAY, INC., SARATOGA HARNESS RACING ASSOCIATION, INC., BUFFALO TROTTING ASSOCIATION, INC., GENESEE-MONROE RACING ASSOCIATION, INC.,

Defendants-Respondents,

and

ROBERT A. GLASSER, SPENCER B. EDDY, JAMES A. FARLEY, as and constituting the STATE HARNESS RACING COMMISSION,

JOSEPH E. MURPHY, FREDERICK R. CLARK, IRA J. PALESTIN, as and constituting the STATE TAX COMMISSION,

ARTHUR LEVITT as Comptroller of the State of New York, and

LOUIS J. LEFKOWITZ as Attorney General of the State of New York,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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IN THE

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Appellant,

against

YONKERS RACEWAY, INC., ROOSEVELT RACEWAY INC., MID-STATE RACEWAY, INC., SARATOGA HARNESS RACING ASSOCIATION, INC., BUFFALO TROTTING ASSOCIATION INC., GENESEE-MONROE RACING ASSOCIATION, INC.,

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JOSEPH E. MURPHY, FREDERICK R. CLARK, IRA J. PALESTIN, as and constituting the STATE TAX COMMISSION,

ARTHUR LEVITT as Comptroller of the State of New York, and

LOUIS J. LEFKOWITZ as Attorney General of the State of New York.

Appellees.

PETITION FOR A WRIT OF CERTIORARI

The Appellant above named, by this petition, asks that this Court grant a writ of certiorari to review a final decision of the Court of Appeals of the State of New York, rendered in the above entitled matter.

Statement of Opinions

The opinion of the Hon. William B. Lawless in the Supreme Court of New York, dated September 22, 1961, was never published in either the official or unofficial reports for the State of New York. However, it may be found at folios 88-123 of the record on appeal.

The Appellate Division of the Supreme Court, Fourth Department, rendered no opinion in affirming the judgment of the Supreme Court. An affidavit to this effect may be found at folios 152-153 of the record on appeal.

The opinion of the Court of Appeals of the State of New York, affirming the judgments of the lower courts, with three judges dissenting, may be found in the official reports of the State of New York at *13 N. Y. 2nd 72*, and in the unofficial reports at *242 N. Y. Supp. 2nd 43*. This opinion is also printed in Appendix "B" of this petition.

Jurisdictional Statement

The decision of the Court of Appeals of the State of New York was rendered on July 10, 1963. On July 26, 1963, an order was entered on the remittitur from the Court of Appeals making the order of the Court of Appeals the order of the Supreme Court, Erie County, New York. (See Appendix "C".)

At the next possible term for the hearing of motions in the Court of Appeals, *i.e.*, the October Term, the Appellant, by notice of motion dated September 19, 1963, moved for an order granting him leave to reargue the case in the Court of Appeals or, in the alternative, for an order directing an amendment of the remittitur to make the federal question contained therein more definite and certain. In a decision rendered October 3, 1963, the Court of Appeals

denied the above motion in all respects. (See Appendix "D".)

As a result of the original decision of the Court of Appeals and the denial of the motion for reargument, Appellant claims that he has been denied due process of law and the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. Accordingly, this Court acquires jurisdiction to review the aforementioned decision by writ of certiorari through Section 1257, Subdivision 3 of Title 28 of the United States Code which provides as follows:

> "§ 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Questions Presented for Review

1. Does the use of the "standing" doctrine by the Court of Appeals in this particular case deny the Appellant due process of law? That is, was the Appellant denied due process of law when the Court of Appeals refused to allow him to challenge the use of public funds for private purposes, such use being forbidden by Article VII, Section 8, of the New York State Constitution?

2. Has the use of the "standing" doctrine by the Court of Appeals denied the Appellant the equal protection of the laws, in that the Court of Appeals, by saying the Appellant is not an aggrieved taxpayer, is refusing to enforce Article VII, Section 8, of the New York State Constitution to the benefit of the Appellees, but to the detriment of the Appellant and all others similarly situated?

3. May the State, as a condition of the exercise of a privilege, compel one person to give his property without consideration or compensation to another?

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

New York State Constitution, Article 7, Section 8, Vol. 2, Part 2, McKinney's Consolidated Laws of New York, p. 211:

"§ 8. (Gift or loan of state credit or money prohibited; exceptions for enumerated Purposes.)

The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational purposes.

Subject to the limitations on indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state; or for the protection by insurance or otherwise, against the hazards of unemployment, sickness and old age; or for the education and support of the blind, the deaf, the dumb, the physically handicapped and juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the state, including school districts; or for the aid, care and support of neglected and dependent children and of the needy sick, through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof, by payments made on a per capita basis directly or through the subdivisions of the state; or for the increase in the amount of pension of any member of a retirement system of the state, or of a subdivision of the state. The enumeration of legislative powers in this paragraph shall not be taken to diminish any power of the legislature hitherto existing. Formerly § 1, derived in part from former § 9 of Art. 8; renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938; amended and approved Nov. 6, 1951, eff. Jan. 1, 1952."

New York State Constitution, Article 1, Section 7(a), Vol. 2, Part 1, McKinney's Unconsolidated Laws of New York, p. 397:

"7. (Compensation for taking private property; private roads, drainage of agriculture lands; excess condemnation.)

(a) Private property shall not be taken for public use without just compensation."

Section 45-a of the Pari-Mutuel Revenue Law of the State of New York, McKinney's Session Laws of the State of New York, 1956, Chapter 837; and also now found as Section 8020 of McKinney's Unconsolidated Laws of the State of New York. (See Appendix "A".)

Statement of Case and Material Facts

By Amendment effective January 1, 1940, the New York State Constitutional prohibition against gambling was relaxed to permit "pari-mutuel betting on horce races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government ". (New York State Const. Art. I, § 9). Pursuant to this authority, the Legislature in the same year enacted the Pari-Mutuel Revenue Law, now (1962), §§ 7951-8051 of the Unconsolidated Laws of the State of New York. We are here concerned with §§ 8001-8051, pertaining to betting at harness horse races.

8019 has always provided that the holders of the winning tickets should receive all sums deposited in any pari-mutuel pool, "less fifteen per centum of the total deposits plus the breaks" ("breaks" are the odd cents over even nickels). The same section has always imposed a percentage tax payable to the State. The tax is levied on the retained fifteen percent, with the balance of the

fifteen percent kept by the tracks for their general expenses and services in conducting the race meets and the pari-mutuel pools. In 1955, the tax was as follows:

As To Each Dollar Bet Daily	Tax
Not over $175,000	5%
Over $175,000 but not over $300,000	7%
Over $300,000 but not over $400,000	8%
Over $400,000 but not over $500,000	9%
Over $500,000 but not over $600,000	10%
Over $600,000	11%

At its 1956 Session, the New York State Legislature enacted § 45-a of the Pari-Mutuel Revenue Law (L. 1956 c. 837, § 7603-a Uncon. Law as then numbered, hereinafter referred to as "§ 45-a"). § 45-a contains a recital that the racetracks have deteriorated and the State is losing tax money by reason thereof. The balance of § 45-a sets up an elaborate scheme to reimburse the tracks for capital improvements; in essence, as follows:

1) A track desiring to make capital improvements first obtains a permit from the Harness Racing Commissioner (§ 45-a, sub. div. 7).

2) After the improvements have been made by the track, and after the State has received from the track taxes in any calendar year equal in amount to the taxes paid during the year 1955, thereafter only half of the tax on the pari-mutuel pool is paid to the State for the balance of the year (§ 45-a, sub. div. 3(c), 4, 5(a)).

3) The other half of the tax money is paid into the track's "construction account" (§ 45-a, sub. div. 5(a)).

4) If, at the end of the calendar year, the State has received from all the tracks the same total amount of pari-mutuel taxes it received in 1955, the track then transfers

its "construction account" money to its own general funds, in reimbursement of sums expended for completed capital improvements (§ 45-a, sub. div. 6);

5) This procedure continues from year to year, until a track has been repaid all of its costs for capital improvements.

In substance, the State reimburses the tracks for their capital improvements, plus the Federal income taxes payable on such reimbursements, plus the tax on the tax payments.

At a Special Session, called for such purpose, the New York State Legislature in 1959 amended § 45-a to cut off State liability for any future capital improvements by the tracks, and also to cut off any reimbursement by the State to the tracks for their Federal income taxes (L. 1959 C. 881).

As of the date of commencing this action, the tracks had permits for capital improvements totaling $42,638,858.40 (fols. 37, 38). They had been paid $20,502,357.24 by the State on account thereof (fols. 37, 38).

Formerly, a portion of the bettor's money was legitimately held for the payment of taxes, services and expenses. Now a portion of the bettor's money is taken from him and paid to the tracks as a gift, obviously the taking of one person's property without compensation and without consideration and equally obvious, a violation of due process and Constitutional prohibitions against the taking of private property without just compensation.

This action was originally commenced in the New York Supreme Court in and for Erie County, New York in 1961. Federal Constitutional questions are raised by the

complaint itself. The complaint sets forth four causes of action which are summarized as follows:

1. First Cause of Action

The Plaintiff sues for a declaration that § 45-a of the Pari-Mutuel Revenue Law is unconstitutional, to prevent the Defendant racetracks from receiving any more moneys from their "Construction Accounts", and to compel them to pay back to the State some $20,500,000, already received by them pursuant to § 45-a (Prayer for Relief, fols. 62-66).

The Plaintiff sues in three capacities: 1) as a person directly aggrieved and having a personal and special interest to be protected, 2) on behalf of all others similarly situated, and 3) on behalf of the People of the State of New York (fol. 23).

The plaintiff sets forth that the Defendant racetracks are incorporated under the Pari-Mutuel Revenue Law (§ 37, Uncon. L. of N. Y., 7595) (fols. 23, 24), and are licensed to conduct harness racing and pari-mutuel betting (fol. 25); that the individual Defendants hold their respective State offices (fols. 24, 25), and that each of the racetracks has had capital improvement permits and has transferred moneys from its "construction account" to its own general funds (fols. 26, 27).

The Plaintiff further alleges that on August 27, 1960, he placed a losing bet at Roosevelt Raceway; that of the sum bet fifteen per cent was retained in the pari-mutuel pool; that a portion thereof was deposited by Roosevelt Raceway in its construction account; and that unless enjoined, Roosevelt Raceway will transfer said portion and other moneys in its construction account to its own general funds (fols. 27-31).

In Paragraphs Nineteenth—Twenty-Second, the Plaintiff claims that the construction account moneys are public moneys; that they consist of a portion of moneys bet by Plaintiff and others; and that the use of such moneys by Roosevelt Raceway for its own private purposes is in violation of the Constitution of the State of New York and the Fourteenth and Fifth Amendments of the Constitution of the United States (fols. 31-33).

The Plaintiff alleges that he has been especially damaged by the taking and use of a portion of his money by Defendant Roosevelt Raceway Inc. for its own private purposes (fol. 34).

Further allegations of the Complaint are that all of the Defendant racetracks have construction accounts and have similarly taken a portion of moneys bet, for their private purposes; that the tracks have taken some $20,500,000. from their construction accounts; are authorized to take $42,638,858.40 (fols. 34-38); and that all of such taking is in violation of the foregoing Constitutional provisions (fols. 34, 35).

The remaining allegations of the Complaint set forth that the Attorney General of the State of New York is joined as a Defendant because it would be futile and useless to ask him to bring an action for the relief requested (fol. 44); that the other Defendants have been joined because of their duties pertaining to pari-mutuel betting and the collection of taxes thereon (fols. 42-45); that irreparable damage will be done to the Plaintiff, others and the State if relief is not granted, and there will not be a multiplicity of suits; that Plaintiff has no adequate remedy at law (fol. 46).

2. Second Cause of Action

The Second Cause of Action is essentially the same, except that the Plaintiff alleges he placed a winning bet and that a portion of the fifteen per cent not returned to the holders of the winning tickets went into Roosevelt's Raceway's construction account (fols. 47-51).

3. Third and Fourth Causes of Action

The Third and Fourth Causes of Action are essentially the same except Plaintiff alleges he placed losing and winning bets at the racing meeting conducted by Genesee-Monroe Racing Association, Inc. (fols. 59-62).

Prayer for Relief

The Plaintiff asks that § 45-a be declared void and unconstitutional; that the Defendant racetracks account and pay over to the State any moneys heretofore received by them; that they be enjoined from receiving any further funds; that the State officials be enjoined from making further payments to the tracks pursuant to § 45-a; and that they collect any moneys heretofore paid to the tracks; that the Plaintiff have such further relief as may be equitable.

By notice of motion and pursuant to New York State Rules of Civil Procedure, Rule 106(2) (fols. 67-83), the Defendant racetracks moved to dismiss the Complaint on the ground that the Plaintiff did not have legal capacity to sue. This motion was granted by an order and judgment made at a Special Term of the Supreme Court, Erie County on October 25, 1961, by the Honorable William J. Lawless (fols. 13-20). The sole ground for the dismissal specified in the order and judgment is that the Plaintiff did not have legal capacity to sue (fols. 88-123).

Plaintiff then appealed the judgment of dismissal to the Appellate Division of the New York State Supreme Court, Fourth Department. The judgment of dismissal was unanimously affirmed by an order of the Appellate Division granted on the 18th day of October, 1962 (fols. 139-144). Judgment was entered on this order of affirmance on the 15th day of March, 1963 (fols. 17-21 of Supplemental Papers On Appeal).

Subsequently the plaintiff applied to the Appellate Division, Fourth Department, for permission to appeal to the Court of Appeals of the State of New York. This application was denied by an order of the Appellate Division entered on the 6th day of December, 1962 (fols. 145-151). Plaintiff then applied to the Court of Appeals of New York for permission to appeal to that Court, and this application was granted by an order of the Court of Appeals (fols. 13-21 of Supplemental Papers On Appeal). However, the Court of Appeals, with three judges dissenting, affirmed the judgment appealed from in an opinion set forth in Appendix "B" of this petition, and an order granted July 26, 1963 was entered upon the remittitur from the Court of Appeals, making the order of the Court of Appeals the order of the Supreme Court, Erie County (see Appendix "C").

At the next term of the Court of Appeals for motions, held in October of 1963, the plaintiff by notice of motion dated September 19, 1963, moved for an order directing reargument of the appeal, or in the alternative for an order directing that the remittitur be amended, to make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether a federal question was necessarily decided. This motion was denied in

all respects by the Court of Appeals in a decision dated October 3, 1963 (see Appendix "D").

Since the Constitutionality of § 45-a of the Pari-Mutuel Revenue Law was raised by the Complaint in this action which was dismissed because of the plaintiff's alleged lack of capacity to sue, plaintiff has been denied the due process of law and the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. It is the dismissal of this particular complaint which raises the federal constitutional question.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The decision of the Court of Appeals of the State of New York denies the appellant due process of law and equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

Through § 45-a of the Pari-Mutuel Revenue Law the appellant here has had his property taken from him through the taxing power of the State of New York, only to have it given to other private entities for their own use and benefit. The appellant has attempted to challenge this use of state funds but has been unsuccessful in his every effort. The Court of Appeals of the State of New York has affirmed the decision that he does not have "standing" to challenge the expenditure of state funds for private purposes, Constitutional Provisions notwithstanding. When the courts take such a position, it becomes the official position of the state. Thus, the State of New York is sanctioning the expenditure of public funds for private endeavors, even though Art. VII, § 8 of the New York State Constitution provides in part as follows:

> "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking. * * * *".

From the above, it can be seen that there is no question that § 45-a of the Pari-Mutuel Revenue Law is beyond the limits of the New York Constitution.

The Fourteenth Amendment to the Constitution of the United States provides in part in section 1 as follows:

> " * * * nor shall any State deprive any person of * * * property, without due process of law; * * * *".

When the Court of Appeals affirmed the dismissal of Appellant's complaint, they deprived him of his property without "due process of law". By the use of the standing doctrine (see Appendix "B", Opinion of the Court of Appeals), which is merely a court made rule, the Court of Appeals, and the State of New York have effectively denied Appellant of his rights under the United States Constitution. Such a court made rule, regardless of the reasons for it, should not be allowed to deprive Appellant of his right to "due process of law". Nevertheless the State of New York acting through its judicial branch has done this very thing.

Additionally, Appellant has been deprived of the "equal protection of the laws", guaranteed by him by the Fourteenth Amendment to the Constitution of the United States. In this particular situation the Court of Appeals of New York is refusing to enforce a section of its Constitution which directly forbids the use of public funds for private enterprises. The "standing doctrine" as used by the Court of Appeals and the court of first instance (see Appendix "B", Opinion of the Court of Appeals and fols. 88-122),

prevents any accounting for the use of the public funds in question.

Fundamentally a situation is presented which involves two private citizens of the State of New York, one receiving a grant of public funds to be used for private purposes, the other powerless to do anything about it. It is apparent, therefore, that because of the "standing doctrine" the Constitution of the State of New York is not being enforced by that State.

Section 1257 of Title 28 of the United States Code allows review of state court decision by the United States Supreme Court by writ of certiorari, " * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." It is through this section that the Supreme Court should issue a writ of certiorari to review the Constitutional issues raised by this petition. There can be no doubt that the State of New York has infringed upon the aforementioned constitutional rights of the Appellant. It has done this through the application of the "standing doctrine" as developed in New York, which forbids citizens from challenging the expenditure of state funds. However, the application in this particular case defeats the rights of the Appellant under the Fourteenth Amendment of the United States Constitution, in that it prevents the challenging of the illegal use of public funds, and prevents the Constitution of the State of New York from being applied with equal force to all citizens of the State.

For the foregoing reasons this Court should grant this petition for a writ of certiorari and an order should be entered accordingly.

Respectfully submitted,

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APPENDIX "A"

§ 45 of the Pari-Mutuel Revenue Law

§ 45-a. 1. The legislature hereby finds that the physical plant and capital structures of some of the harness race tracks in the state have become depreciated and inadequate for the proper conduct of harness horse race meetings; that, as a result, the number of admissions to harness horse race meetings in the state and the sums deposited in pari-mutuel pools therein have been limited and the state has lost substantial revenues and income which would accrue from increased admissions and the deposit of larger sums in pari-mutuel pools; and that enlargement and modernization of plant and structures of such tracks in this state would result in increased admissions and larger sums being deposited in pari-mutuel pools and would, therefore, redound to the financial benefit of the state and to the comfort, safety and convenience of its citizens. In order to remedy such situation and facilitate the enlargement and modernization of plant and structures in existing tracks and the construction of adequate and modern plant and structures in future tracks, this legislation is enacted.

2. Definitions. As used in this section:

(a) "Harness race track" is any association or corporation authorized under this chapter to conduct pari-mutuel betting at a harness horse race meeting on races run thereat;

(b) "The breaks" are the odd cents over any multiple of five calculated on the basis of one dollar and otherwise payable to a patron;

(c) "The base tax of an existing harness race track" is an amount equal to the total tax paid by it to the state tax

commission in the calendar year nineteen hundred fifty-five for the privilege of conducting pari-mutuel betting at races run at the harness race meetings held thereat and the "Base tax of any future harness race track" is an amount equal to the highest tax paid by it in any of the first five calendar years of its operations for the privilege of conducting pari-mutuel betting at races run at harness race meetings held thereat;

(d) "Capital improvement" is any kind of improvement of a capital nature to the land, physical plant or structures now or hereafter owned or leased by a harness race track which is used or is to be used by it in connection with the conduct of harness horse race meetings and shall include, but shall not be limited to, the destruction of any existing structure, the addition to any existing structure, the erection of any new structure and any site improvements in any existing or future track provided, however, that it shall not be deemed to include the purchase price of any land.

3. The provisions of section forty-five of this chapter shall apply to any future harness track until it has completed five calendar years of operation. However, for each existing harness track and for each further harness track after it has completed five calendar years of operation, the provisions of section forty-five-a shall apply instead of the provisions of such section forty-five.

4. Every such harness race track shall distribute all sums deposited in any pari-mutuel pool to the holders of winning tickets therein provided such tickets be presented for payment before April first of the year following the year of their purchase, less fifteen per centum of the total

deposits plus the breaks. Of the sum so retained in any calendar year, an amount equal to five per centum of the amount of the total daily pool not exceeding one hundred seventy-five thousand dollars, seven per centum of the amount of the total daily pool in excess of one hundred seventy-five thousand dollars but not in excess of three hundred thousand dollars, eight per centum of the amount of the total daily pool in excess of three hundred thousand dollars but not in excess of four hundred thousand dollars, nine per centum of the amount of the total daily pool in excess of four hundred thousand dollars but not in excess of five hundred thousand dollars, ten per centum of the amount of the total daily pool in excess of five hundred thousand dollars but not in excess of six hundred thousand dollars, and eleven per centum of the amount of the total daily pool in excess of six hundred thousand dollars plus fifty per centum of the amount of the breaks shall be paid by such harness race track to the state tax commission until the total of its payments to the state tax commission for the calendar year equals that proportion of its base tax as the number of days theretofore raced and to be raced thereafter in said calendar year bears to the number of days raced in the calendar year nineteen hundred fifty-five. The balance of such retained amount shall be disposed of as provided in subdivision five of this section.

§ 5. (a) Every such harness race track which in any calendar year pays to the state tax commission an amount equal to the proportion of its base tax specified in subdivision four of this section shall in such year open a special account in its own name followed by the words "construction account" in a bank subject to the jurisdiction of this state and thereafter shall deposit therein

of the sums retained from any pari-mutuel pool, one-half of the amount determined by the same percentages of such pool set forth in subdivision four of this section which it had theretofore in such year paid to the state tax commission and it shall pay the other half of said amount so determined to such commission.

(b) Information as to the moneys deposited by such harness race track in such construction account shall be transmitted by it to the state harness racing commission at such regular intervals as the state harness racing commission may require and shall be accompanied by a report under oath showing the total of all such deposits in said construction account, together with such other information as the state harness racing commission may require.

6. On or before December thirty-first in each calendar year:

(a) (1) If the harness race track has not completed capital improvements with the approval of the state harness racing commission as hereinafter in subdivision seven of this section provided, or if, having completed capital improvements with such approval, it has ceased to be entitled to the payments from the construction account as hereinafter in subdivision ten of this section provided, it shall pay all sums in the construction account in its name to the state tax commission.

(2) If the total payments, including those in subparagraph (1) of this paragraph (a) of this subdivision six, by all existing harness race tracks to the state tax commission for the privilege of conducting pari-mutuel betting for the calendar year were less than the total base tax

(the amount by which same is less being hereinafter in this section referred to as the "difference"), each harness race track which has moneys deposited in a construction account in its name shall pay therefrom to the state tax commission such a proportion of the difference as the amount of moneys in its construction account bears to the amount of moneys at that time in all harness race track construction accounts in this state. The state harness racing commission shall give reasonable notice to each such harness race track of the amount so to be paid by it out of its construction account to the state tax commission.

(b). So much as remains undistributed in each construction account after the payments provided for in paragraph (a) of this subdivision six shall be transferred by the harness race track to its own general funds if said harness race track shall have completed capital improvements with the approval of the state harness racing commission as hereinafter in subdivision seven of this section provided and if it shall not have ceased to be entitled to payments from its construction fund as hereinafter in subdivision ten of this section provided.

7. Any harness race track may apply to the state harness racing commission for permission pursuant to the provisions hereof to make one or more capital improvements. The state harness racing commission shall determine whether a proposed capital improvement will ultimately add to the revenues of the state, will improve racing in this state, and will promote the comfort, safety and convenience of the public and, on a finding in the affirmative, shall issue its permit that such improvement be constructed under the provisions of this subdivision. The

state harness racing commission shall, on application by any harness race track, make a finding as to the date when, if any, such capital improvement was completed and, if it was completed, the cost thereof.

8. Funds in a construction account shall be held by the harness race track not as public moneys but solely for the purpose of making the distribution as provided in this section.

9. (a) All payments provided in this section to be made to the state tax commission shall constitute a reasonable tax by the state for the privilege of conducting pari-mutuel betting on races run at harness race meetings held by harness race tracks, which tax is hereby levied. Except for the payments to the state tax commission provided in paragraph (a) of subdivision six such tax shall be paid to the state tax commission at such regular intervals as the state tax commission may require. The balance of the moneys from the pool and the breaks may be held by the harness race tracks for their own use and purposes.

(b) Payment of all taxes imposed by this section shall be accompanied by a report under oath showing such information as the state tax commission may require. Such taxes when collected shall be paid by the state tax commission into the general fund of the state treasury.

10. The payments provided in paragraph (b) of subdivision six of this section to be made from the construction accounts to harness race tracks shall be made only to such a harness race track which completes one or more capital improvements with the approval of the state har-

ness racing commission and then only from the date of the completion of any capital improvement with the approval of the state harness racing commission until such date as the amounts paid to such harness race track from the construction account, less income taxes paid thereon to the United States by such harness race track, equals the cost of the capital improvement as determined by the state harness racing commission. The capital cost of improvements shall not be deemed to include interest on indebtedness, real estate taxes or insurance premiums. In determining the amount of taxes paid by any such harness race track to the United States in any calendar year it shall be deemed that said amounts were taxed at the highest rates actually paid to the United States by such harness race track for the particular year involved.

11. Except as otherwise provided in chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," as amended, no county, city, town, village or other political subdivision of the state may impose, levy or collect a tax on admission fees or tax on admission, on wagers made by patrons in the form of purchases of pari-mutuel tickets or upon such tickets, on pari-mutuel pools, on breaks, on dividends or payments made to winning bettors, or on that part of the pari-mutuel pools or breaks to be retained by harness race tracks under this subdivision.

12. The state harness racing commission may adopt rules and regulations to effectuate the provisions of this section.

APPENDIX "B"

Opinion

STATE OF NEW YORK
COURT OF APPEALS

No. 67

EDWARD C. ST. CLAIR, Individually &c.,
Appellant.

vs.

YONKERS RACEWAY, INC., & ors.,
Respondents.

and

ROBERT A. GLASSER, & ors., as and constituting the STATE HARNESS RACING COMMISSION & ors., &c.,
Defendants.

BURKE, J.:

The simple question presented on this appeal is whether the complaint was properly dismissed on the ground that appellant lacks legal capacity to sue.

The appellant, who allegedly placed small wagers—$18.00 in all—at racetracks of several of the corporate defendants, brought this suit to collect the difference between the amount of the payments made to the State by such racetracks at the tax rates reduced by an amendment of the Pari-Mutuel Revenue Law (L. 1956, Ch. 837) and the amount which the State would have obtained under the tax rates in effect prior to the effective date of that amendment, and to require payment in the future at the old rates. The respondents, joined by the Attorney General, moved to dismiss the complaint on the ground that appellant

lacked standing to dispute the constitutionality of the amendment.

Once again we are presented with an attempt to change the law of this State, which is also the law of the United States of America. We have always held that the constitutionality of a State statute may be tested only by one personally aggrieved thereby, and then only if the determination of the grievance requires a determination of constitutionality. Under that ruling an unaggrieved citizen taxpayer, such as appellant, lacks standing to challenge a statute's constitutional validity. Appellant's contentions were rejected by this Court in the case of *Bull v. Stichman*, 298 N. Y. 516, aff'g 273 App. Div. 311. In the *Bull* case the dissent in the Appellate Division was based on the cases appellant relies upon here, *Matter of Kuhn v. Curran*, 294 N. Y. 208, and *Heim v. McCall*, 214 N. Y. 629. This Court's unanimous affirmance in spite of the dissent disposed of the theory that the rule regarding taxpayers' cases permitted exceptions.

Thus we have found anew that the rationale propounded in *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155, and *Schieffelin v. Komfort*, 212 N. Y. 520, remains sound today. It seems to us proper "that the courts of this State have denied the right of a citizen and taxpayer to bring before the court for review the acts of another department of government simply because he is one of many such citizens and taxpayers" (*Schieffelin v. Komfort*, 212 N. Y. 520, 537).

As Judge Chase stated in the *Schieffelin* case:

> "Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments

of government. The jurisdiction to declare an act of the legislature unconstitutional arises because it is the province and duty of the judicial department of government to declare the law in the determination of the individual rights of the parties.

The assumption of jurisdiction in any other case would be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the Constitution itself." (212 N. Y. at p. 530.) This concept was later advanced by Mr. Justice Black in *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 132, when he said:

"Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public."

The judgment appealed from should be affirmed without costs.

APPENDIX "B"

Dissenting Opinions

FULD, J. (dissenting):

The plaintiff, seeking to prevent the alleged misapplication of more than $42,000,000, sues as a citizen and taxpayer for a judgment declaring that section 45-a of the

Appendix "B"

Pari-Mutuel Revenue Law (L. 1956, ch. 837) violates the constitutional prohibition against the expenditure of public funds to private parties (N. Y. Const., art. VII, § 8). The courts below dismissed the complaint and we are called upon to decide whether this State shall continue to be one of the very few remaining jurisdictions to adhere to the rule that a citizen-taxpayer, who cannot show any direct or personal injury, lacks standing to challenge allegedly unconstitutional expenditures of state monies.

Though the rule is one which has been consistently applied by this court for more than 100 years (see, *e.g.*, *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155; *Kilbourne v. St. John*, 59 N. Y. 21, 27; *Schieffelin v. Komfort*, 212 N. Y. 520; *Bull v. Stichman*, 298 N. Y. 516; *Dorsen v. Stuyvesant Town Corp.*, 299 N. Y. 512, cert. den. 339 U. S. 981),[2] it has not only been sharply criticized by writers on the subject (see, *e.g.*, 3 Davis, Administrative Law Treatise [1958], § 22.09, p. 243 *et seq.*, § 22.10, p. 249 *et seq.*; Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 353, 386 *et seq.*; Jaffe, Standing in Public Actions, 74 Harv. L. Rev. 1265; Note, Taxpayers' Suits, 69 Yale L. J. 895) but rejected by the courts of many juris-

[1] We know from earlier litigation that this is no specious charge or feigned controversy. In *Matter of Roosevelt Raceway v. Monaghan* (9 N. Y. 2d 293) not only did the court expressly reserve the very question here sought to be raised (p. 303) but one judge actually expressed the view that section 45 was "constitutionally invalid" in its entirety (pp. 311-315, *per* Dye, J., concurring).

[2] It is difficult to reconcile the cited cases with those challenging official action with respect to nonfiscal matters. (See, *e.g.*, *Matter of Cash v. Rice*, 301 N. Y. 258, 261; *Matter of Kuhn v. Curran*, 294 N. Y. 207, 213; *Andrews v. Kiely*, 277 N. Y. 271, 281; 3 Davis, Administrative Law Treatise, *op. cit.*, pp. 249-250.) In the *Cash* case (301 N. Y. 258, *supra*), for instance, the court held that "the erroneous appointment [ ] ought to be open to attack by the petitioners, because as citizens and taxpayers they are entitled to an opportunity to insist upon the construction which this court placed upon the civil service article of the State Constitution" (p. 261).

dictions. (See 3 Davis, Administrative Law Treatise, *op. cit.*, p. 245; Jaffee, Standing in Public Actions, 74 Harv. L. Rev. 1265, 1278.) At the present time, virtually every State, either by decision or by statute—New York, by section 51 of the General Municipal Law—permits taxpayers to challenge *local* action and at least 34 States clearly sanction taxpayers' suits at the state level, that is, actions by state taxpayers challenging state action; indeed, only two States—New York and New Mexico—squarely prohibit such actions. (See Jaffe, Standing in Public Actions, 74 Harv. L. Rev. 1265, 1278; Note, Taxpayers' Suits, 69 Yale L. J. 895, 900-902.)[3] "This trend," it has been said, "reflects the absence of significant reasons for distinguishing municipal taxpayers' suits, permitted practically everywhere, from their state counterparts. True, the taxpayer's contribution to the state treasury may be a lesser percentage of the total than his municipal tax payments, and his interest in state affairs might therefore be said to be more remote. But no overriding considerations—such as the need for executive flexibility on the national level in foreign affairs and defense—make review of state action less desirable than review of the affairs of local government." (Note, Taxpayers' Suits, 69 Yale L. J. 895, 902.)

Of this, there can be no possible doubt. The State has a vital concern, its People a deep interest, in seeing to it

[3] The Federal courts also deny standing to taxpayers attacking Federal expenditures. (See, *e.g.*, *Massachusetts v. Mellon*, 262 U. S. 447.) However, the Supreme Court in the *Mellon* case differentiated between taxpayers attacking the expenditures of the Federal Government and those challenging the expenditure of local funds. (See, also, *Wieman v. Updegraff*, 344 U. S. 183; *Everson v. Board of Education*, 330 U. S. 1; Hart and Wechsler, The Federal Courts and the Federal System [1953], pp. 160-162.) Thus, observed the court in *Mellon* (262 U. S., at p. 486), "The interest of a taxpayer of a municipality in the application of its monies is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court."

that the provisions of our Constitution are enforced, and unconstitutional expenditures of State funds prevented. Neither logic nor policy demands that the judiciary stay its hand and dismiss the action simply because the proceeding happens to be initiated by a vigilant and civic-minded taxpayer following official inaction. It hardly seems consonant with the Constitution itself that the enforcement of its provisions should have to turn on the meaning ascribed to it by members of the executive or administrative branch of government or on whether they choose to assert themselves.

It is self-evident that the denial of standing to a taxpayer will in most instances prevent any challenge to an expenditure of State funds as violative of the Constitution. The suggestion in the opinion of the majority that the Attorney General and other State officials may be relied upon to attack the constitutional validity of State legislation is both unreal in fact and dubious in theory. As to the Attorney General, for example, it would seem more appropriate to his office that he defend a statute's constitutionality when it is challenged than initiate an attack of his own. (*Cf.* Executive Law, § 71.) Certainly, our Constitution does not entrust the determination of constitutionality to the executive branch of the government. But, in any event, if there is an official who is authorized to act and he declines to assert the invalidity of the statute, or otherwise raise that issue, the question whether the expenditures made pursuant to the statute's provisions violate the State Constitution will never be subjected to judicial scrutiny.

The Constitution is a People's document and the hypothesis that a citizen-taxpayer has no "interest" in State ex-

penditures is little more than a legal fiction. It cannot be squared with the generally accepted doctrine that a taxpayer on the municipal level—where the issues are rarely of comparable importance—does possess the requisite "direct and immediate" interest to warrant his bringing an action to challege the expenditure of municipal funds. (*Massachusetts v. Mellon*, 262 U. S. 447, 486, *supra*.) And, beyond that, as the Illinois Supreme Court declared in a case involving the alleged misappropriation of State monies, the taxpayers' "ownership of such funds and their liability to replenish the public treasury for the deficiency," which might be occasioned by their misuse, should be deemed sufficient to supply the essential basis for standing. (*Turkovich v. Board of Trustees of the University*, 11 Ill. 2d 360, 362.)

Little is to be gained by extended discussion of the few arguments which have been put forward to support perpetuation of the rule denying standing to taxpayers on the State level, and I consider briefly but two of them.

Less than persuasive is the claim that the court's assumption of jurisdiction in these suits in the face of inaction by the executive branch of government charged with the responsibility of preventing the waste of public funds, "would be an interference by one department of government with another." (*Schieffelin v. Komfort*, 212 N. Y. 520, 530, *supra*.) Fundamental to our form of government is the principle that determination of the constitutionality of legislation is essentially a judicial function. And this being so, it is difficult to understand how it may be said that a court, in making such a determination, would be interfering with another branch of government, or usurp-

ing the latter's powers simply because it acts in a case initiated by a taxpayer. In brief, litigation such as this calls upon the courts to assess the constitutional validity of legislation, not to supervise the acts of another branch of government.

Nor do I find any basis for the concern—expressed in the *Doolittle* case (18 N. Y. 155, 162, *supra*) and elsewhere—that opening the doors of the court to taxpayers would cause a flood of actions by officious meddlers. If there ever was reason for such a fear, it has been completely dispelled by the experience not only of the many jurisdictions where taxpayers' suits on the State level have long been sanctioned, but, indeed, of our own State of New York under the statute permitting municipal taxpayers to challenge the action of local officials (Gen. Mun. Law, § 51). The New Jersey high court accurately appraised the situation when many years ago it observed that "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks." (*Ferry v. Williams*, 41 N. J. L. 332, 339; see Davis, Standing to Challenge Governmental Action, 39 Minn. L. Rev. 354, 430.)

The courts undoubtedly can be relied upon to discourage and prevent baseless taxpayers' suits by insisting that the action pose an issue of general public importance; that it involve an actual *bona fide* controversy, not one which is feigned; that all interested parties be represented; that there be no other remedy available; and that the public

officials vested with authority to bring an action shall have refused to do so. All of these conditions have been met in the case before us.

In sum—although the Legislature could, of course, remove the taxpayer's disability at a stroke, enforcement of the Constitution should not depend upon the will of the legislative branch any more than on that of the executive. The apathy of the average citizen concerning public affairs has often been decried; under the rule now reaffirmed, it is being compelled. I would change the rule.

The judgment appealed from should be reversed and the motion to dismiss the complaint denied.

DYE, J. (dissenting):

I concur with all that Judge Fuld has said and would like to add that in this case, as in others, where a court-made rule has gained veneration by long user (*Bing v. Thunig*, 2 N. Y. 2d 656; *Woods v. Lancet*, 303 N. Y. 349 [*cf.* comments by Desmond, Ch. J., in dissenting opinion, *People v. Lane*, 10 N. Y. 2d 347]), it does not necessarily follow that such a rule should be interposed to give a benediction to a patently unconstitutional gift of over forty-two million dollars of the State's money to a private corporation (N. Y. Const., Art. VII, § 8 [1]; *Matter of Roosevelt Raceway v. Monaghan*, 9 N. Y. 2d 293, 311). If a choice is to be made between constitutional observance and a rule such as *Doolittle v. Supervisors of Broome County* (18 N. Y. 155); *Schieffelin v. Komfort* (212 N. Y. 520), the choice should and must be the Constitution. Further, our state government operates under a triparte system pursuant to a constitutional form.

which is reason enough for each branch of the government to be mindful of its mandate. The *Doolittle* rule has been widely criticized for reasons far less compelling than those presented by the facts of this case. Early in our history the courts favored the taxpayer. While we have come a long way since then, it is not too late to reinstate the dignity of the taxpayer. When wrong is threatened or actually accomplished, every taxpayer suffers a loss, for in the end it is his pocketbook that must bear the ultimate burden. The personal monetary interest should not be the test, but whether, in fact, the Constitution of the State of New York is being flouted.

It is well settled that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit (*New York Central R. R. Co. v. White*, 243 U. S. 188; *Munn v. Illinois*, 94 U. S. 113; *ILEY v. City Rent & Rehabilitation Administration*, 11 N. Y. 2d 480; *ILEY v. State Temporary Housing Rent Commission*, 10 N. Y. 2d 263). I am not at all convinced that the race tracks of New York have such a vested interest in the *Doolittle* rule as to prevent testing the constitutionality of 43 [a] of the Pari-Mutuel Law (L. 1956, ch. 837), a question which we expressly left open in *Matter of Roosevelt Raceway v. Monaghan (supra)*.

For these reasons I vote to reverse the order appealed from.

Judgment affirmed, without costs. Opinion by Burke, J. All concur except Fuld, J., who dissents in an opinion in which Dye, and Van Voorhis, JJ., concur, Dye, J., in a separate opinion.

APPENDIX "C"

Order on Remittitur

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie at the Erie County Court House, Buffalo, New York, on the 26 day of July 1963.

Present: Hon. Mathew J. Jasen, *J. S. C., Justice.*

—o—

EDWARD C. ST. CLAIR, Individually and in his own right as a person directly aggrieved and on behalf of all others similarly situated and on behalf of the PEOPLE OF THE STATE OF NEW YORK as a citizen and taxpayer thereof,

Plaintiff,

against

YONKERS RACEWAY INC., ROOSEVELT-RACEWAY INC., MID-STATE RACEWAY INC., SARATOGA HARNESS RACING ASSOCIATION, INC., BUFFALO TROTTING ASSOCIATION, INC., GENESEE-MONROE RACING ASSOCIATION, INC.,

ROBERT A. GLASSER, SPENCER B. EDDY, JAMES A. FARLEY, as and constituting the STATE HARNESS RACING COMMISSION,

JOSEPH H. MURPHY, FREDERICK R. CLARK, IRA J. PALESTIN, as and constituting the STATE TAX COMMISSION,

ARTHUR LEVITT, as Comptroller of the State of New York, and

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants.

—o—

The plaintiff above named having appealed to the Court of Appeals from the Judgment of Affirmance herein entered

in the Office of the County Clerk of the County of Erie on March 15, 1963 upon the Order of the Appellate Division, Fourth Judicial Department, filed in the Office of the Clerk of said Appellate Division, unanimously affirming the Judgment of the Supreme Court, Erie County, dismissing the complaint herein, entered in the Office of the County Clerk of the County of Erie on October 31, 1961,

And said appeal having been duly argued in the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said Judgment of Affirmance appealed from as aforesaid be affirmed without costs,

NOW, on motion of Rosenman Colin Kaye Petschek & Freund and George Morton Levy, attorneys for defendant, Roosevelt Raceway, Inc., it is

ORDERED that the said order of the Court of Appeals is made the order of this Court, and that the complaint herein is dismissed, without costs.

ENTER:

MATHEW J. JASEN, *J. S. C.*

Granted
Jul 26, 1963.
C. McDonald,
Sp. Dep. Clerk.

APPENDIX "D"

Decision, Court of Appeals, October 3, 1963

—o—

Mo. No. 643

EDWARD C. ST. CLAIR, Individually &c.,
Appellant,

vs.

YONKERS RACEWAY, INC., & ors.,
Respondents,

and

ROBERT A. GLASSER, & ors., as and constituting the STATE HARNESS RACING COMMISSION & ors., &c.,
Defendants

—o—

Motion for reargument or in the alternative, to amend the remittitur denied.